

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

MAXIE MOORE, aka MICHAEL ALLEN  
O'NEAL,

Defendant/Petitioner.

Case No. C03-5292JET  
CR99-5534JET  
C01-5089JET

ORDER

THIS MATTER comes on before the above-entitled court upon Defendant's Motion for Reconsideration and Supplemental 28 U.S.C. §2255 petition.

Having considered the entirety of the record and files herein, the Court finds and rules as follows:

Defendant's original 2255 motion was dismissed as untimely on July 1, 2004. Defendant filed a Motion for Reconsideration, which was granted on August 21, 2003. Defendant's 2255 motion was denied on the merits on July 14, 2004. Defendant filed a supplement to his 2255 petition based on Blakely v. Washington, 124 S.Ct. 2531 (2004), and a Motion for Reconsideration. Reconsideration was granted on August 3, 2004 in order to consider the Blakely issues raised by Defendant. The Court then stayed proceedings pending the outcome of United States v. Booker,

1 125 S.Ct. 738 (2005).

2 In Booker, the Supreme Court made Blakely applicable to the federal sentencing guidelines.  
3 Booker does not apply retroactively to cases on collateral review because it is a new procedural rule  
4 that does not implicate the fundamental fairness of the criminal proceeding. Vega-Gil v. United  
5 States, 2005 WL 901043 (10<sup>th</sup> Cir. 2005 ); Schiro v. Summerlin, 124 S. Ct. 2519, 2523 (9<sup>th</sup> Cir.  
6 2004); rather, Booker applies “to all cases on direct review”. Booker, 125 S.Ct. at 769. See United  
7 States v. Price, 400 F.3d 844 (10<sup>th</sup> Cir. 2005) (Blakely not retroactive on collateral review).  
8 Defendant’s conviction became final before Blakely was decided, therefore Blakely does not apply to  
9 Defendant’s case. Furthermore, the United States Supreme Court has not made Blakely or Booker  
10 retroactive to cases on collateral review. See In re Anderson, 396 F.3d 1336, 1339-40 (11<sup>th</sup> Cir.  
11 2005); Tyler v. Cain, 533 U.S. 656, 121 S.Ct. 2478 (2001) (a new rule is retroactive to cases on  
12 collateral review only if Supreme Court hold it to be retroactive).

13 Therefore, Defendant’s supplemental 2255 petition is DISMISSED.

14 In order for an appeal to proceed, this Court must issue a Certificate of Appealability. See 28  
15 U.S.C. §2253; United States v. Asrar, 108 F.3d 217 (9<sup>th</sup> Cir. 1997). For the certificate to issue, this  
16 Court must determine that “the applicant has made a substantial showing of the denial of a  
17 constitutional right” and the Court must “indicate which specific issue or issues satisfy the showing.”  
18 28 U.S. C. 2253(c)(2)-(3). If the Court denies the certificate, it must “state the reasons why such a  
19 certificate should not issue.” Fed.R.APP.P. 22(b); Asrar, 108 F.3d at 218.

20 For the foregoing reasons, the Court declines to issue a Certificate of Appealability because  
21 Defendant has failed to make “a substantial showing of the denial of a constitutional right.” 28  
22 U.S.C. §253(c)(2).

23 IT IS SO ORDERED.

24 The Clerk of the Court is directed to send uncertified copies of this order to all counsel of  
25 record.

1 DATED this 25<sup>th</sup> day of April, 2005.

2  
3 /s JACK E. TANNER

4 \_\_\_\_\_  
5 JACK E. TANNER  
6 SR. UNITED STATES DISTRICT JUDGE  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26